

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION**

VFS LEASING CO.)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION NO.
)	3:06cv638-SRW
)	
G.F. KELLY, INC. d/b/a KELLY)	
TRUCKING; and GUY KELLY,)	
)	
Defendants)	

**PLAINTIFF’S MOTION FOR LEAVE OF COURT
TO MODIFY RULE 16(B) SCHEDULING ORDER**

COMES NOW Plaintiff VFS Leasing Co. (“Plaintiff” or “VFS”) and moves this Court to modify its November 3, 2006 Order (the “Scheduling Order”) to allow Plaintiff to submit rebuttal evidentiary material with its Reply to Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment (“Reply”). As grounds for this motion, Plaintiff states as follows:

1. Federal Rule of Civil Procedure 16(b) permits a Scheduling Order to be modified upon a showing of good cause and upon leave of court. See also Lyons v. Serrano, 205 Fed. Appx. 719 , 722 (11th Cir. 2006). Plaintiff requests that this Court modify its Scheduling Order to allow Plaintiff to submit additional evidentiary material because good cause clearly exists in this case.
2. Defendants’ Opposition to Plaintiff’s Motion for Summary Judgment (“Opposition”) relies exclusively on the affirmative defense of Plaintiff’s alleged failure to mitigate damages. In conjunction with their Opposition, Defendants submitted the “expert” affidavits of Guy F. Kelly and Charles David Lance that purport to articulate, for the first time, Defendants’ basis for their affirmative defense, upon which they bear the burden of proof.

3. The rebuttal expert reports that Plaintiff submitted in support of its Reply only address the issue of its alleged failure to mitigate. Plaintiff simply could not respond to Defendants' "evidence" in its initial Motion for Summary Judgment offered with respect to their affirmative defense.
4. WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that this Court modify its Scheduling Order and allow Plaintiff to submit rebuttal evidentiary material with its Reply.

Respectfully submitted this 7th day of May, 2007.

s/ David B. Hall

DAVID B. HALL (HAL052)

JULIE A. COTTINGHAM (COT017)

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CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of May, 2007, the foregoing has been electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing, to the following counsel of record:

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s/ David B. Hall

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